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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 447

WALTER B. JOHNSON, T. R. HUSTED, B. A. WEST, CHARLES RIGGS, GEORGE GOFF, MIKE MCGREW, LEWIS KOLB, J. M. GENTRY AND IVAN KENNEDY,

Petitioners,

vs.

YELLOW CAB TRANSIT COMPANY, a Corporation,

Respondent.

REPLY BRIEF OF PETITIONERS

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January, 1944.

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In order to state perhaps more clearly our position and to correct some statements made in the brief of respondent and in oral argument by counsel, we desire to present a short reply brief.

On page 4 of respondent's brief it is stated that if the shipment of liquor had been delivered it would have been received by the secretary of the club for the various officers "and distributed to them." The quoted words are not supported by any proof or included in the stipulation of facts. On the contrary, we expressly and positively refused to so stipulate. In oral argument before the Court, counsel endeavored to support this statement in their brief by reading to the Court the concluding language of the supplemental stipulation as same appears at the bottom of page 17 and top of page 18 of the record. The quoted language, however, is not found therein. Such a provision was contained in the stipulation as prepared by counsel for respondent, but, as appears from the original on file in the office of the clerk of the district court, was crossed out. We refused to agree to something not supported by any proof and contrary to that which we had every reason to believe, to-wit: that if any officers who had signed orders had cancelled the same or been transferred to some other post the liquor would be sold and delivered to such other officers as might desire the same. In further effort to support the claim that the purchase of the liquor was concluded in the State of Illinois and thus evade, if possible, the provisions of the federal statute (10 U. S. C. A., § 1350, 31 Stat. 758, quoted in our original brief), counsel state on page 28 of their brief that the sale of the liquor was consummated in the State of Illinois "as the petitioners have admitted." At no time

have petitioners ever made such an admission and the statement finds no support in the question from our Circuit Court of Appeals' brief contained in the note at the bottom of said page 28. Said quotation was taken from page 26 of our brief in the Circuit Court, where we state:

> "In the district court plaintiff advanced the proposition that the officers' club was a government instrumentality. However, the contention was wholly untenable, not supported by any authority and in direct conflict with two opinions of the Judge Advocate General, and we anticipate that no such argument will be made here. Moreover, the officers' club was not concerned with this shipment, which was neither ordered nor purchased by nor to be the property of the club."

During the oral argument counsel for respondent was asked where payment was made, whether the liquor was send c.o.d. or payment made in Illinois. The reply was to the effect that payment was made in Illinois. We do not believe that counsel intentionally mis-stated the facts, but had he paused for a moment's reflection he would have remembered that the liquor had not been paid for: that, as set forth in the stipulation, the order was given by the secretary over the telephone and shipment made thereon. Also, that at the time the supplemental stipulation was made checks deposited with the secretary by some of the officers had already been returned to them. This latter statement is outside of the record, but counsel's statement to the Court was also outside of the record and contrary to the facts of the situation, as well known

to counsel on both sides. We think we may reasonably conclude that the shipment was not made c.o.d. because of the provisions of 18 U. S. C. A., § 389 (Criminal Code, § 238), making it unlawful for the carrier of liquor "from one state, territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other state, territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof," which prohibits the delivery or sale therein of such liquor, "* * * to collect the purchase price or any part thereof or in any manner act as the agent of the buyer or seller except for the actual transportation and delivery." The liquor house in St. Louis had no dealings with the officers at Fort Sill, received no order from them, did not know them, and did not ship or consign the liquor to them. It seems apparent that the shipment was made and consigned to the club with the intent that the club or its secretary should dispose of the liquor and collect and transmit the money to the shipper. To such transaction said Section 1350, *supra*, and also Section 6, Title 37, O. S. 1941, seem to us clearly applicable.

With further reference to Sections 31 and 32, Title 37, O. S. 1941, discussed on pages 35 and 36 of our brief, we call attention to the fact that the difficulty originated with the old case of *Ex parte Wilson*, 6 Okla. Cr. 451. That case was decided in 1911, which was prior to the Webb-Kenyon Act and also prior to some very pertinent de-

cisions of this Court, including that of *James Clark Distilling Co.* v. *Western Maryland Railway Co. et al.*, 242 U. S. 311, 61 L. ed. 326, cited on page 50 of our brief. In Ex parte Wilson, our Court held said Section 31 to be contrary to the Constitution of the United States. Unquestionably the court would not have so held if it had had before it the opinion of this Court in the James Clark Distilling Company case, *supra*. The West Virginia statute and said section of the Oklahoma Code are almost identical, the principal difference being that possession of more than a quart would be necessary to constitute the offense under the Oklahoma statute while no minimum was stated in the statute of West Virginia. These later decisions of this and other courts have never been considered by the Oklahoma court, and we think we may well expect a different result when the question again is presented to our own court. Furthermore, no such difficulty exists with reference to other sections of our statutes which we have discussed in our brief.

With further reference to the inquiry of Mr. Justice Black concerning the application of our laws to shipments of liquor being transported entirely across the state to a destination in some other state, we have found no case in which an attempt has been made to interfere with such shipment. Personally the writer feels that a shipment of liquor in transit to a destination in a state in violation of the laws of that state and consequently of the Twenty-

first Amendment and the 1936 Act of Congress should be denied the protection of interstate commerce, not only upon crossing the line into the state of destination, but also during the entire course of its transportation. It would not seem that it should be true that the federal government would say to those transporting such a shipment "we will protect you in your possession and transportation of the liquor through all intermediary states until you reach the border of the state of destination. Then we will prosecute you and confiscate the liquor because of your violation of the Twenty-first Amendment and the Act of Congress, and will also permit such prosecution and confiscation by the officers and courts of the state of destination." Should it not rather be true that the protection of interstate commerce should entirely be withdrawn from such illegal shipment? This, however, is simply expressed as the writer's personal opinion and is not being briefed as we do not consider the question vital to our case.

In the difficult task of enforcing its prohibitory laws the State of Oklahoma has, since the adoption of the Webb-Kenyon Act and with the exception of the period during which such assistance was withdrawn due to the interpretation placed by the Treasury Department and the Circuit Court of Appeals upon the 1936 Act of Congress and prior to the adoption of the 1939 Act of our Legislature, enjoyed the co-operation of the federal government. We feel that we are entitled to a continuance of such co-opera-

tion, and that the fact that scattered over the entire state are innumerable areas such as postoffices, defense plants, military areas, parks, Indian lands and tracts of unappropriated public land, should not result in constituting each such area a thorn thrust deep into the side of Oklahoma. Our problem would be made immeasurably more complicated if the federal government is to give its protection to shipments of liquor because they may be consigned for delivery upon some tract of unappropriated public land, a lot set aside for a postoffice site, a defense plant, a park or other of the almost innumerable areas in Oklahoma over which the federal government has jurisdiction. During the oral argument we were asked as to the number of federal areas in the state. We have no way of knowing, but the number is very large. From the recent report of the Byrd Committee it appears that the federal government owns approximately one-fifth of the entire area of the United States, including more than forty per cent of the states of California and Oregon. The complicated situation thus created can only be satisfactorily solved through co-operation. The over-riding authority of the federal government should not be exercised in such a way as to seriously hamper, if not destroy, the efforts of the state to enforce its laws.

Respectfully submitted,

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